

# Influencing change in the field of Occupational Health and Safety (OSH)

Fundamental Rights and Litigation Advisory Group, Online (25<sup>th</sup> February 2022)

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## **Knowledge based activism** (M. Schaapman, 2021):

A form of political activism, that is organized around the strategic collection and tactical use of technical, scientific and legal knowledge.

## **Legal purposes of Strategic Litigation** (N. Countouris, 2021):

- Change *within* the law: achieve a more favourable interpretation, application of the law, clarify a point in law
- Changes *against* the law: aiming to quash a provision, overturn established “negative” precedents (e.g., actions for annulment or judicial review)
- Changes *beyond* the law: challenge the law both to quash it and obtain legal changes

## **Non legal purposes of Strategic Litigation :**

- Mobilisation: internal mobilisation of member, members recruitment, renewal by targeting certain groups particularly exposed to certain risks, solidarity between different groups
- Campaigning: highlighting dangerous practices, to lobby and influence law makers
- European integration: ensure upward integration and level playing field; ensure integration between different European legal regimes, e.g., EU, ESC, ECHR, and ILO instrument.

# Occupational Health and Safety: Strategic Litigation

Change *within* the law: achieve a more favourable interpretation, application of the law, clarify a point in law

**National Level:** France, Covid-19 & Consultation of workers and their representatives

Cour of Appeal, Versailles, 24<sup>th</sup> April 2020

**Outcome:** organizational changes required to prevent adequately all the risks related to the pandemic (the biological, physical, but also psychological risks) should be part of a consultation with the workers' representatives. It was a strong signal and enforcement of the employer's duty to consult workers' representatives for the OSH prevention.

**European Level:** CJUE, Spain, Pregnant workers & OSH Risk assessment

Otero Ramos (C-513/15) & Castro (C-41/17)

**Outcome:** Reversal burden of proof (art 19, Dir. 2006/54/EC) applies also to the OSH obligations when it is about workers under the scope of Dir. 92/85/EC. Also, the risk assessment is a "*systemic examination of **all aspects** for work which comprises at least three phases:*

- *Identification of hazards (physical, chemical and biological agents; (...) mental and physical fatigue; other physical and mental burden),*
- *Identification of worker categories which are exposed to (...) those risks,*
- *The qualitative and quantitative risk assessment to assess whether or not the hazard identified entails a risk (...) for workers."*

# Occupational Health and Safety: Strategic Litigation

Changes *beyond* the law: challenge the law both to quash it and obtain legal changes

**National Level:** UK, Judicial review & Extension of the scope of application of Dir.89/391/EEC

*WUGB v SSWP and Others*

**Outcome:** UK Government failed to implement articles 8(4) and 8(5) of Dir. 89/391/EEC and article 3 of Dir. 89/656/EC (on personal protective equipment). One key discussion revolved around the personal scope of the Dir. 89/391/EEC and the meaning of the “worker” definition (art 3(a) of the Dir. 89/391/EEC) – within the specific context of the UK Labour Law and OSH legislation. Still, in this ruling, the judge referred to Article 31 of the Charter as an interpretive aid to determine the purpose, and so the scope of the framework directive.

**European Level:** CJUE, Spain, Covid-19

*T-484/20: SATSE v European Commission*

**Outcome:** (Negative Outcome) Failed to complete this requirement: *art. 263 TFEU. Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person of which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*

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## **Multi Annual Project (2020-2025)**

- **15-16 January 2020: ETUI Seminar – Strategic Litigation on Occupational Health and Safety (An Overview)**

The seminar has taken stock of OSH litigation before the Court of Justice of the EU (CJEU), while identifying potential for further action. Additionally, it explored possibilities for (strategic) litigation at the national level.

- **24-25 February 2021: ETUI Annual Conference – Strategic Aspects of Occupational Safety and Health Litigation**

Had a practical orientation, and focused on the usefulness of litigation as a means to reach Unions' goals. It included legal as well as strategic issues. (1) The legal potential of cases, (2) The creative use of the EU OSH Legal Framework (national and european levels), (3) Perspectives of other stakeholders influencing the OSH litigation (e.g., Labour Inspectorates, Experts and Judges)

- **31 May 2022: OSH Strategic Litigation at a legal cross-road (on-going preparation)**

Address “litigation scenarios”. For each session there will be two speakers; one being specialized in OSH, and the other being an expert in the “overlapping” field. Both speakers will present some background to strategic litigation in their field, and then should provide element on how they would address in a strategic manner the litigation case presented. A discussant who has expertise in both fields would reflect on the presentations.

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## **Multi Annual Project (2020-2025)**

- April 2022 – March 2025: Book « Strategic Litigation in Occupational Health and Safety in the European Union » (work in progress)

Two parts: (1) Theoretical, (2) Practical examples (Target 8 national chapters)

## CONCLUSION

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### Relevance of OSH in Strategic Litigation: Multiplicity of angles

- Collective & Individual aspects
- Involvement of various actors (including workers' representatives & Trade Unions)
- Examples at the national and European levels
- Different fields: Civil claims, employment tribunals and/or criminal proceedings
- OSH is at the centre of work (entry door for: implementation of AI, use of chemicals, telework etc).

**Aim:** Learning from one another aiming at increase of knowledge and capacity building.

Thank you!

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